

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KATHRYN SCHULTZ and ROBERT SCHULTZ
individually and as successors in
interest to LOREN SCHULTZ, decedent;
and DOES 1 through 10, inclusive,

Plaintiffs,

v.

ASTRAZENECA PHARMACEUTICALS, L.P.;
ASTRAZENECA, L.P.; JOHNSON & JOHNSON
AND JANSSEN L.P. FKA JANSSEN
PHARMACEUTICA PRODUCTS, L.P.; JANSSEN
PHARMACEUTICA, INC.; RONALD HAYMAN,
M.D.; and DOES 11 through 50,

Defendants.

No. C 06-6681 CW

ORDER DENYING
DEFENDANTS' MOTION TO
STAY ACTION AND
GRANTING PLAINTIFFS'
MOTION TO REMAND

Defendants AstraZeneca Pharmaceuticals L.P. and AstraZeneca
L.P. (together, AstraZeneca) have filed a motion to stay
proceedings in this action pending its transfer to the Judicial
Panel on Multidistrict Litigation (MDL). Plaintiffs Kathryn and
Robert Schultz oppose this motion and move separately to remand
this action to state court. Defendants AstraZeneca, joined by

1 Defendants Johnson & Johnson and Janssen L.P. (formerly known as
2 Janssen Pharmaceutica Products L.P.), Janssen Pharmaceutica, Inc.
3 (together, Janssen), and Ronald Hayman, M.D., oppose Plaintiffs'
4 motion. Having considered all of the papers filed by the parties,
5 the Court DENIES Defendants' motion to stay and GRANTS Plaintiffs'
6 motion to remand.

7 BACKGROUND

8 For the purposes of this motion only, all the facts alleged in
9 Plaintiffs' first amended complaint (FAC) are assumed to be true.

10 Defendants AstraZeneca manufacture and market the atypical
11 antipsychotic drug Seroquel. FAC at ¶ 1. Seroquel was approved by
12 the FDA in 1997 for the treatment of schizophrenia and in 2004 for
13 the treatment of bipolar disorder. FAC at ¶¶ 34, 35. Defendants
14 Janssen manufacture and market the atypical antipsychotic drug
15 Risperdal. FAC at ¶ 1. Risperdal was approved by the FDA in 1997
16 for the treatment of schizophrenia and in 1999 for the treatment of
17 mania associated with bipolar disorder. FAC at ¶¶ 48, 49.

18 In advertising these medications, both companies promoted them
19 for uses "beyond [their] indications," including "off-label" uses
20 not approved by the FDA, and offered "incentives" to doctors who
21 would prescribe them. FAC at ¶¶ 37, 51. The use of both drugs has
22 been associated with an increased risk of, among other things,
23 developing hyperglycemia, diabetes, and pancreatitis. FAC at ¶¶
24 42, 55. The warnings accompanying both drugs were inadequate
25 regarding the nature, scope, and severity of the risks associated
26 with them and both companies withheld important safety information
27 from physicians while promoting these drugs as safer and more
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1 effective than other available treatments. FAC at ¶¶ 39-41, 43,
2 52-54, 56.

3 Dr. Ronald Hayman, M.D., prescribed both Seroquel and
4 Risperdal to minor Loren Schultz for the treatment of Tourette's
5 Syndrome and obsessive compulsive disorder. FAC at ¶ 125. Neither
6 drug is approved for treatment of these conditions or "for use in
7 children." Id. Plaintiffs allege that Dr. Hayman "held [himself]
8 out to be knowledgeable in the safety, efficacy, and use of
9 Seroquel and Risperdal" and did not warn decedent or his parents of
10 the risks associated with the drugs, including hyperglycemia,
11 diabetes, and pancreatitis. FAC at ¶¶ 125, 127. They also claim
12 Dr. Hayman failed to conduct baseline testing of the drugs or to
13 continue to monitor the decedent's reaction to the drugs in the
14 course of providing medical treatment. FAC at ¶ 125. On July 12,
15 2005, nineteen year-old Loren Schultz died from acute pancreatitis.

16 On June 30, 2006, Kathryn and Robert Schultz filed a complaint
17 in the San Francisco County Superior Court against Defendants,
18 seeking civil damages resulting from the alleged wrongful death of
19 their son. On July 6, 2006, the MDL Panel issued a transfer order
20 establishing MDL proceeding No. 1789, In re Seroquel Products
21 Liability Litigation, coordinating in the Middle District of
22 Florida the pre-trial proceedings of eighty-seven Seroquel actions.
23 On October 10, 2006, Plaintiffs filed their FAC in superior court.
24 After removing this case to district court on October 27, 2006,
25 Defendants AstraZeneca filed this motion to stay the action pending
26 a decision by the MDL Panel as to whether this case will join other
27 Seroquel actions transferred to the Middle District of Florida.

1 Plaintiffs then filed this motion to remand the case to state court
2 on the grounds that this Court lacks jurisdiction. Plaintiffs
3 originally asked for attorneys' fees and costs in their motion to
4 remand, but have since withdrawn that request.

5 LEGAL STANDARD

6 A defendant may remove a civil action filed in state court to
7 federal district court so long as the district court could have
8 exercised original jurisdiction over the matter. 28 U.S.C.
9 § 1441(a). If at any time before judgment it appears that the
10 district court lacks subject matter jurisdiction over a case
11 previously removed from state court, the case must be remanded. 28
12 U.S.C. § 1447(c). On a motion to remand, the scope of the removal
13 statute must be strictly construed. Gaus v. Miles, 980 F.2d 564,
14 566 (9th Cir. 1992). "The 'strong presumption' against removal
15 jurisdiction means that the defendant always has the burden of
16 establishing that removal is proper." Id. Courts should resolve
17 doubts as to removability in favor of remanding the case to state
18 court. Id.

19 District courts have original jurisdiction over all civil
20 actions "where the matter in controversy exceeds the sum or value
21 of \$75,000, exclusive of interest and costs, and is between . . .
22 citizens of different States." 28 U.S.C. § 1332(a). When federal
23 subject matter jurisdiction is predicated on diversity of
24 citizenship, complete diversity must exist between the opposing
25 parties. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-
26 74 (1978). An exception to the complete diversity requirement
27 exists where a defendant removes a case with a non-diverse
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1 defendant and persuades the district court that this defendant was
2 fraudulently joined. McCabe v. Gen. Foods Corp., 811 F.2d 1336,
3 1339 (9th Cir. 1987). Joinder of the resident defendant is
4 fraudulent "[i]f the plaintiff fails to state a cause of action
5 against a resident defendant, and the failure is obvious according
6 to the settled rules of the state." Id. The burden is on the
7 defendant to demonstrate that there is no possibility that the
8 plaintiff will be able to establish a cause of action in state
9 court against the alleged sham defendant. Id.; see also Ritchey v.
10 Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).

11 DISCUSSION

12 AstraZeneca removed this case on the grounds that Dr. Hayman,
13 the only non-diverse defendant joined in the action, is a sham
14 defendant because Plaintiffs cannot state a cause of action against
15 him for professional negligence. The Court disagrees.

16 To determine its jurisdiction, the Court need not decide
17 whether Plaintiffs can prove a legally cognizable claim of
18 professional negligence against Dr. Hayman, but only that they have
19 plead one under state law. Briggs v. Lawrence, 230 Cal. App. 3d
20 605, 610 (1991). Under California law, the elements of a cause of
21 action for professional negligence are (1) the duty of the
22 professional to use such skill, prudence, and diligence as other
23 members of his or her profession commonly possess and exercise; (2)
24 breach of that duty; (3) proximate causal connection between the
25 negligent conduct and the resulting injury; and (4) actual loss or
26 damage resulting from such negligence. Bucquet v. Livingston, 57
27 Cal. App. 3d 914, 920-21 (1976). A failure to plead any of these
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1 elements would be fatal to Plaintiffs' claim against Dr. Hayman.

2 It is Defendants' burden to demonstrate that there is no
3 possibility that Plaintiffs will be able to establish a cause of
4 action against Dr. Hayman in state court. On a demurrer, a
5 California court will liberally construe all of the complaint's
6 properly plead material allegations as true and "give the complaint
7 a reasonable interpretation by reading it as a whole and all its
8 parts in their context" to "ensure the pleading . . . apprises the
9 adversary of the factual basis for the claim." People ex rel.
10 Lungren v. Superior Court, 14 Cal. 4th 294, 300 (1996); Lim v.
11 The.TV Corp. Int'l, 99 Cal. App. 4th 684, 690 (2002); see also Cal.
12 Civ. Proc. Code § 452 (West 2006). Moreover, "[i]n testing the
13 legal sufficiency of a pleading against a general demurrer, all
14 properly pleaded allegations, including those that arise by
15 reasonable inference, are deemed admitted regardless of the
16 possible difficulty of proof at trial." Saxer v. Philip Morris,
17 Inc, 54 Cal. App. 3d 7, 18 (1975). However, "[a]n allegation that
18 an act is wrongful and unlawful is a mere conclusion" and
19 "conclusions of law are not admitted by demurrer." Metzenbaum v.
20 Metzenbaum, 86 Cal. App. 2d 750, 754 (1948); Vilardo v. Sacramento
21 County, 54 Cal. App. 2d 413, 418-419 (1942).

22 The FAC is not "devoid" of factual allegations as Defendants
23 have argued. Plaintiffs allege that Dr. Hayman is a medical
24 professional who rendered medical services to Loren Schultz, and
25 thus had an implied duty to exercise care for his patient as other
26 members of his profession would. FAC at ¶ 124. They also allege
27 that Dr. Hayman prescribed Seroquel and Risperdal to the decedent
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1 for uses unapproved by the FDA and failed to monitor the results
2 this action would have on him. FAC at ¶ 125. Plaintiffs further
3 allege that Dr. Hayman failed to warn of any of the adverse effects
4 Seroquel and Risperdal may have caused while holding himself out to
5 be knowledgeable about the safety of these medications. FAC at ¶¶
6 125, 127. The effects Dr. Hayman allegedly failed to disclose
7 include not only the pancreatitis that caused the decedent's death
8 at the age of nineteen, but other potential risks that Dr. Hayman
9 may have or should have known about. These allegations apprise Dr.
10 Hayman "of the nature, source and extent" of the cause of action
11 against him sufficiently to state a claim for professional
12 negligence in California state court. Metzenbaum, 86 Cal. App. 2d
13 at 753.

14 In their notice of removal, Defendants argued that Plaintiffs'
15 allegation that Dr. Hayman prescribed Seroquel and Risperdal for
16 non-approved uses is insufficient to sustain a claim of
17 professional negligence. Although the cases cited by both parties
18 indicate that a mere allegation of "off-label" use with nothing
19 more would not be sufficient to state a claim for professional
20 negligence, the allegations that Dr. Hayman prescribed both drugs
21 for unapproved uses, failed to monitor his patient's reaction to
22 the treatment and failed to warn his patient of any potentially
23 serious adverse effects do state a colorable claim of professional
24 negligence. Whether or not Plaintiffs can ultimately prove Dr.
25 Hayman's liability in state court is not for this Court to decide.

26 Defendants also argue that the facts Plaintiffs plead in the
27 FAC make a cause of action against Dr. Hayman "factually
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1 impossible" because Plaintiffs allege that AstraZeneca and Janssen
2 purposely concealed information about adverse effects from
3 everyone, including doctors. Defendants rely on Baisden v. Bayer
4 Corp., 275 F. Supp. 2d 759, 763 (S.D. W.Va. 2003), in which the
5 court ruled that where "the gravamen of the malpractice case"
6 against a doctor was "his failure to know what allegedly was
7 deliberately hidden" by the defendant pharmaceutical company, it
8 was insufficient under Federal Rule of Civil Procedure 8(a) to
9 allege nothing more than that the doctor lacked knowledge of a
10 medication's adverse side effects.

11 Defendants' reliance on Baisden here is misplaced; it is
12 distinguishable on the facts and does not address California state
13 pleading requirements or professional negligence law. A complaint
14 may plead inconsistent causes of action in California "if there are
15 no contradictory or antagonistic facts." Berman v. Bromberg, 56
16 Cal. App. 4th 936, 944-945 (1997) (citing Steiner v. Rowley, 35
17 Cal.2d 713, 718-719 (1950)). Thus, "unless the alternate pleadings
18 contain antagonistic statements, the statement of facts sufficient
19 to constitute a cause of action in one count is not a bar to the
20 maintenance of a separately stated count in the same pleading based
21 upon inconsistent allegations." Id. The facts plead in this case
22 are not inconsistent. Plaintiffs do not claim that AstraZeneca and
23 Janssen concealed all information on the adverse effects of
24 Seroquel and Risperdal from doctors, but rather that the warnings
25 regarding these risks were inadequate in relation to their
26 severity. FAC at ¶¶ 39-41, 43, 52-54, 56. Nor do Plaintiffs
27 simply contend that Dr. Hayman should have known what AstraZeneca
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1 and Janssen allegedly kept from him, but that he prescribed
2 Seroquel and Risperdal for unapproved uses, failed to give any
3 warnings about them even though he held himself out to be competent
4 in their use, and failed to monitor the decedent's reaction to
5 them. FAC at ¶¶ 125, 127. The FAC also alleges that AstraZeneca
6 and Janssen encouraged "off-label use" and offered doctors
7 "incentives" to over-prescribe their drugs. FAC at ¶¶ 37, 51. Far
8 from making claims against individual doctors "factually
9 impossible," these allegations indicate a concerted effort on
10 behalf of both companies to encourage doctors to ignore their own
11 professional judgment.

12 For these reasons, the allegations against Dr. Hayman are
13 sufficient to state a claim for professional negligence.
14 Defendants have failed to show that there is no possibility that
15 Plaintiffs will be able to establish liability against Dr. Hayman
16 in state court and thus have not met their burden to show that Dr.
17 Hayman is fraudulently joined. Therefore, the Court remands this
18 case to state court for lack of jurisdiction.

19 CONCLUSION

20 For the forgoing reasons, Defendants' motion to stay is DENIED
21 (Docket No. 5) and Plaintiffs' motion to remand (Docket No. 7) is
22 GRANTED.

23 IT IS SO ORDERED.

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25 Dated: 12/22/06



26 CLAUDIA WILKEN
27 United States District Judge
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